After the Independent Counsel Act: Where Do We Go from Here

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Everyone who gets the call from Washington to come and serve their country hopes that at the end of their allotted brief span, they will be able to look back and feel that some good was accomplished, and that they did more than just tread water and mark time. Just a short time ago, in 1998, I was no different. Since my service as United States Attorney in Detroit during the Carter Administration, I had felt that my ideal job with the Justice Department would be the one I am privileged to hold today. As I prepared to take on the job during the spring of 1998, I mulled over ideas for new federal initiatives against novel forms of crime in our increasingly international and technologically interconnected world; I ruminated over management improvements for the nearly 1,000 employees in the Criminal Division who soon would be under my supervision; I dreamed about forging new working relationships with the 94 United States Attorneys Offices and among the various federal, state, and local law enforcement organizations.

Little did I know before I arrived that I would be walking into the waning days of a two decade experiment—the Independent Counsel Act—an experiment that would eat the hours of my days and nights with a voracious appetite that seemed to know no bounds. I initially approached the question of the future of the Act with an open mind. My tilt, if any, would have been toward the notion that the statute was an appropriate vehicle to deal with conflicts inherent in having the Department of Justice conduct investigations of very
high level members of the administration. Had I been pressed to take a position, I would have described myself as being in the "mend it" rather than "end it" camp. I was surprised to find that I would look back a year later and regard the demise of that experiment with a sense of great accomplishment, as a hallmark in the annals of good government.

The Independent Counsel Act became law in 1978 while I was the United States Attorney in Detroit. It was a grand experiment, embarked upon during the post-Watergate era of reform and high resolve. The experiment was designed to ensure that allegations of criminal conduct against the highest level executive branch officials, those as to whom it might reasonably be presumed that the Justice Department would have a conflict of interest to investigate or prosecute, were handled by an outside Independent Counsel, with a statutory source of authority independent of the Justice Department. Throughout its history, the Act proved to be a lightning rod for criticism, but Congress reauthorized the Act three times during the ensuing two decades, and the Supreme Court, notwithstanding a prescient dissent by Justice Scalia, concluded it passed constitutional muster in *Morrison v. Olson.* Nevertheless, during the last few years, thoughtful observers within and without the government, both Republicans and Democrats and from all along the political spectrum, began to come together in a consensus that the Act was in fact a failed experiment that had not and could not work to achieve its fundamental goal of enhancing public confidence in the impartial administration of justice.

As time for a fourth reauthorization of the Act approached, the Justice Department, after careful deliberation and much internal discussion, formally took the position that the Act should be allowed to die. At the same time, the mood of the press and the people had become markedly opposed to the Act, and the few efforts in Congress to legislate a continuation of any system of Independent Counsels fizzled. On June 30, 1999, within a week of my first anniversary in

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office, the former Independent Counsel Act lapsed,\textsuperscript{7} and a well-meaning but flawed experiment came to an end.

That same day, the Attorney General approved new Department of Justice regulations designed to bring some order and regularity to the procedures that would be used when matters arise that would create a conflict of interest for the Department.\textsuperscript{8} In rejecting the structure of the Act, however, none of us intended to turn our backs on the important lessons of the Watergate scandal. First, we understood that there are some criminal investigations of very high level executive branch and Department of Justice officials that cannot credibly be handled by the Department of Justice through its ordinary investigative and prosecutorial procedures. In such cases the perceived conflict of interest would be so great that public confidence in the fairness and thoroughness of the investigation simply could not be achieved. Watergate certainly was such a case, and others have occurred from time to time throughout our history, though the number is far smaller than the number of cases that the Independent Counsel Act removed from the Department's hands.

Second, we recognized that a clear, orderly set of procedures, thought out in advance and based on our substantial experience with outside investigations under the Act, was vital to provide structure and consistency to our consideration of these politically charged and deeply sensitive matters as they arose. It was important not to leave the system adrift, as it had been before the enactment of the Independent Counsel Act, leaving us to react to a crisis situation with a crisis response. Therefore, we set about to draft a set of regulations flexible enough to enable appropriate individualized responses to the infinite array of situations that can arise, but structured enough to provide a buffer to ad hoc, poorly thought out reactions that create more problems than they solve.

\section*{I. The Problems of the Independent Counsel Act}

With these two lessons in mind, I will share some of the experiences and frustrations I encountered with the Independent Counsel Act that led me to conclude that the Act was in fundamental tension with the processes of good government and that it should be ended rather than mended. Unfortunately, many of the events that led me to my conclusions are still confidential, and I am unable to talk or answer questions about them. Nevertheless, I think I can give you enough detail to explain my conversion. I then will outline the procedures that the Attorney General has put in place in the new

\textsuperscript{7} See 28 U.S.C. § 599.

\textsuperscript{8} See 28 C.F.R. §§ 600.1-600.10 (2000). For background and discussion of these regulations, see Office of Special Counsel, 64 Fed. Reg. 37,038-37,042 (1999).
regulations to address the very real conflicts of interest that can exist within the Department of Justice when criminal allegations arise involving very high level executive branch officials, the conflicts that led to the Watergate crisis and that persuaded Congress two decades ago that the Independent Counsel Act was necessary.

Let me begin with a few caveats. First of all, whatever you may have read or heard about tensions between the various Independent Counsels and the Department of Justice, I firmly came to believe that the structural weaknesses of the Act were the problem, not individual failures or personalities. The Independent Counsels who have served during my tenure in the Justice Department have made significant sacrifices to carry out the responsibilities charged to them, and have performed a public service at considerable personal cost.

A further caveat is that neither I nor anyone else at the Department of Justice is foolish enough to think that we have solved the riddle and come up with the perfect solution in the regulations the Attorney General adopted in 1999. Instead, we have all learned painful lessons in a fundamental truth of democratic governance; first, there are no solutions to some dilemmas, and second, the answers that are there are never neat and tidy with all the corners tucked in and the bows tied. We have all had reinforced for us the basic truth that democracy is a messy business. Perhaps H.L. Mencken was right when he observed: "there's always an easy solution to every human problem: neat, plausible and wrong."

In 1978, however, Congress believed that it had found the solution to the problem posed by Watergate. There was a great wave of legislation designed to reform government in the 1970s. Election crimes, conflicts of interest, tax information secrecy, and financial disclosure by public officials all received congressional attention. Among the reforms were the special prosecutor provisions of the Ethics in Government Act of 1978, which established a new framework for the handling of investigations involving the highest level executive branch officials, a framework that would survive for the next two decades.

The Act seemed simple in concept. First, it identified a group of individuals in particular positions, for the most part composed of Cabinet Members, White House aides, and Justice Department officials, including me, who became known as "covered persons." Congress concluded that investigation of criminal allegations against any of these people would presumptively create a conflict of interest.

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for the Department. Then, it mandated that an Independent Counsel from outside government be appointed by a special panel of federal judges to investigate and, if appropriate, prosecute any allegation against these individuals, unless the Department of Justice, in the course of a brief preliminary investigation, had established that there were no reasonable grounds to believe that further investigation was warranted. Take note that the standard required the Department to prove a negative, always a difficult proposition, and certainly one alien to normal decision making in criminal law enforcement. To ensure that the Independent Counsel would have sufficient authority to do a thorough job, the Act required that the special panel of judges grant broad jurisdiction to the new Independent Counsel, covering not only the allegation referred by the Attorney General, but "all matters related to" that allegation and all matters arising out of the Independent Counsel's jurisdiction.

At that point, a new Independent Counsel was launched, with a virtually unlimited budget, no time limits, and an amorphous, broad jurisdictional mandate. Furthermore, he or she reported to no one, and his or her decisions were neither reviewed nor approved by anyone. Neither the courts nor the Department of Justice—indeed, no federal officer, elected or appointed—had the authority to supervise the Independent Counsel's conduct or actions, except in the hypothetical event that he or she engaged in such gross misconduct as to require that the Attorney General fire him or her. While Independent Counsels were in theory bound to follow established departmental policies, the vast majority of prosecutorial policies that guide the exercise of discretion by federal prosecutors are both unwritten and deliberately flexible, to accommodate a variety of potential situations, and are ill-suited to guide the decision making of anyone outside the system. Thus there were few practical checks of any sort on the men and women who served as Independent Counsels.

My role as the head of the Criminal Division, charged with preparing a recommendation for the Attorney General as to how allegations against statutory covered persons should be handled, and with coordinating with and assisting Independent Counsels after their appointment, provided me with a unique opportunity quickly to gain exposure to this controversial Act. Indeed, exposure, after exposure, after exposure. From my first month in office in 1998, until the expiration of the Act, I supervised the handling of no less than nine

full-fledged inquiries pursuant to the Act.

Perhaps my strongest feeling about the whole process was that administration of the Act required an extraordinary expenditure of time and energy by high-level Justice Department personnel. By its very existence, the Act warped out of all proportion the handling of minor, even petty matters that under any other circumstance would have been quickly and appropriately resolved by career prosecutors. Its procedures required the devotion of countless hours of time at the very highest levels of the Department of Justice to resolve each of these matters.

For example, a frustrated Congressman embroiled in a political dispute with the administration, writing to us that he had been “misled” by a Cabinet Secretary in a Congressional hearing about some minor point, could thereby mandate, under the provisions of the Act, a full-fledged criminal investigative response. Meeting the standards of the Act required the deployment of teams of FBI agents and prosecutors to gather documents and conduct investigative interviews of dozens of witnesses. This would be followed up by hours of review, legal analysis, and writing and internal consultation, all to conclude that there was nothing to investigate—when any sensible prosecutor reviewing such a letter complaining about a non-covered Assistant Secretary would have reached the same conclusion on the same day the letter was received. The potential the Act created for political abuse and manipulation of the criminal justice system by those opposed to the administration was troubling.

Furthermore, one of the many ironies of the Act, which illustrates how it warped appropriate and orderly consideration of criminal allegations, was that far from removing the handling of a matter from the political realm, by shifting responsibility for decision making at every stage of a preliminary investigation from career prosecutors to the Attorney General herself, it required the participation and intervention of political appointees in the handling of these sensitive allegations. The Act forced the hands-on, day-to-day involvement of the entire chain of command up to the highest levels within the Department to resolve every allegation. This involvement absorbed countless hours of my time and energies, as well as that of the Attorney General and the Deputy Attorney General—time that frankly could have been far better utilized addressing the many serious criminal law enforcement problems facing our nation.

But of course, there were other problems with the Act as well, problems which cumulatively led to my conclusion, and the conclusion reached by the Department as a whole, that the Act
should be scrapped. In its announcement of its decision not to support reauthorization, the Department cited a number of these problems.

Primary among them was our overwhelming consensus that the Act had failed in its primary goal of enhancing public confidence in the fairness and impartiality of investigations of high government officials. Indeed, it was our conclusion that the very processes and procedures of the Act itself had contributed to a sense of cynicism and negativity among the citizenry during recent years. We also concluded that far from protecting the process from allegations of partisan political considerations, the Act did just the opposite. Virtually every decision associated with the application of the Act produced partisan criticism and counter-criticism. In the end, the Department of Justice itself, including its talented career prosecutors, became the subject of attacks that undermined its core mission of providing fair, vigorous, nonpartisan law enforcement.

Second, the operation of the Act was crushingly expensive, absorbing tens of millions of dollars to resolve a handful of criminal allegations. Whether costs at this astronomical scale are justified might be open to discussion if the Act met its critical goal of enhancing public confidence, but since it did not, it was clearly not cost-effective.

We also noted our concern that the Act tipped the traditional balance of fairness and restraint at work in the administration of criminal justice. By providing one “target” covered person to investigate, and removing from the Independent Counsel all constraints that guide the work of ordinary prosecutors who operate within the confines of the established, ongoing organizational structure of the Department of Justice, the Act inevitably created subtle, and not-so-subtle, changes in the decision making process. The notion may have been best captured by a remark attributed to Mark Twain, who once said: “to a man with a hammer, a lot of things look like nails.” The Act even pointed out the “nail” to the person handed the hammer.

Finally, we expressed our concern that the categorical approach of the Act led to its application in situations far beyond the stated justification for its enactment. By listing covered persons and setting such a low threshold for the sort of information that would cause the procedures of the Act to kick in, the statute swept within its

16. See Holder, supra note 6, at 2; Reno, supra note 6, at 4-5.
17. See Holder, supra note 6, at 2; Reno, supra note 6, at 4-5.
18. See Holder, supra note 6, at 2; Reno, supra note 6, at 4-5.
19. See Holder, supra note 6, at 6; Reno, supra note 6, at 6-8.
20. See Holder, supra note 6, at 6-7.
very cumbersome and expensive scope far more than those few situations in which it might reasonably be presumed that there would be a conflict of interest for the Department.

Others agreed with the conclusion we reached, and faced with a near-total lack of interest or enthusiasm for the continuation of this flawed experiment, Congress let the Independent Counsel Act lapse when it expired on June 30, 1999. Except for the continuation of active Independent Counsel investigations that were ongoing on that date, the experiment was over.

II. A New Approach

As I pointed out earlier, however, we had learned at least two important lessons from Watergate. The first was that there are indeed some matters that the Department of Justice cannot itself credibly or properly investigate. The second was the importance of having an established procedural framework in place to handle these rare situations, so that we are not left in the position of scrambling to set up an acceptable ad hoc alternative under the pressure of a crisis. Taking these two lessons to heart, the Attorney General signed new regulations into effect on June 30, 1999 establishing procedures to govern situations where she concludes that an investigation by the Department itself would constitute a potential conflict of interest, and that the public interest would be served by an outside investigator.21

As the Department was in the process of drafting the new regulations, it received a number of suggestions. The one designed to appeal most to present and former Assistant Attorneys General for the Criminal Division was the one offered by Common Cause. This proposal, as described in an August 3, 1999 letter to Attorney General Reno would have "automatically locate[d] procuratorial authority over all cases, including high-level matters, with career prosecutors operating under the final authority of the Assistant Attorney [for the Criminal Division]."22 Former Watergate Special Prosecutor Archibald Cox also endorsed this idea in a letter he sent to Michigan Senator Carl Levin, noting as justification that: "In recent decades the Assistant Attorney General for the Criminal Division, although appointed by the President, has invariably been an experienced professional without strong political ties or obligations."23 Under Professor Cox's statutory proposal, the

decisions of the Assistant Attorney General concerning the investigation and prosecution would have been final in all cases “subject to reversal by the Attorney General if he or she believes the decision is plainly wrong—but only if so expressed in a public statement giving the reasons.”24 As appealing as this idea might have been to me and others who served as Assistant Attorneys General for the Criminal Division, the idea did not, as they say, have “legs”—no doubt for the very reason recognized by Common Cause in the letter making the proposal: “legitimate questions could be raised about whether vesting discretion in the Assistant Attorney General adequately ensures real independence—and importantly, public confidence grounded on the appearance of real independence—in the investigation of the President and other high-level officials.”25

The regulations reflect a new emphasis on a return to political accountability and a reliance on the constitutional system of checks and balances that underlies our form of government, with each branch of government ultimately answerable to the people. They reflect the judgment that turning to an outside counsel is essentially an act of political leadership by the Attorney General in extraordinary situations where there is a conflict of interest for the Department and the public interest would be served by having someone outside the Department investigate the matter. At the same time, they provide that she cannot shed the ultimate accountability to the people for the responsible handling of the matter. They also constitute a frank acknowledgment that there is no perfect solution under our constitutional system to the problem of an apparent conflict of interest created by the close relationship, whether political or institutional, between the Department of Justice and some of those whom it might find necessary to investigate.

Unlike the assumptions built into the former Act, we do not believe that the situations that warrant looking beyond the established investigative and prosecutorial procedures of the Department can be readily identified and described in advance. Therefore, we built a great deal of flexibility and discretion into the regulations, so that different situations can be dealt with in a way best suited to each situation. For example, the regulations eliminate the rote listing of covered persons relied upon in the Act, eliminate the artificial time periods imposed by the Act, and eliminate the restrictions on use of various normal investigative techniques imposed by the Act. Instead, they rely on a determination by the Attorney General that a particular situation first, would create a potential conflict of interest for the Department of Justice, and second, that the

24. Id.
public interest would be served by having an outsider handle the matter.\textsuperscript{26}

The regulations go on to set out specific criteria for the selection of a Special Counsel.\textsuperscript{27} It is our view that the selection of the appropriate person may be the most important decision the Attorney General makes under the regulatory scheme, and the criteria we set out reflect our view that the success of the process will largely depend on the qualifications of the individual selected. The regulations require that "[a]n individual named as Special Counsel shall be a lawyer with a reputation for integrity and impartial decision making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies."\textsuperscript{28}

This is the first safeguard for a fair and independent investigation that is built into the regulations. A Special Counsel of the stature and experience articulated in the regulations, with no vested interest in the Department of Justice, no long-term job at stake, and no political identification with or antipathy toward the administration will have credibility with the public. It will be clear to all fair-minded observers that such an individual would not tolerate any inappropriate interference with his or her investigation. An appropriate background investigation and conflicts of interest examination is an established part of the selection process,\textsuperscript{29} and while full-time employment is not mandated for all Special Counsels, each Special Counsel must agree that the investigation he or she has agreed to undertake will come first in his or her professional life, and that a full-time commitment may be necessary in the course of the investigation.\textsuperscript{30}

The regulations contemplate that a Special Counsel's jurisdiction will be articulated as a specific factual statement of the matters to be investigated.\textsuperscript{31} It is intended that these jurisdictional statements should be limited, factual, and specific, to avoid the frequent complaint that Independent Counsel investigations have been open-ended and wide-ranging, going far beyond the original reasons for the appointment. We are well aware that criminal investigations sometimes develop in unexpected ways, and therefore a flexible procedure is set out for the Special Counsel to obtain needed

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\item \textsuperscript{26} See 28 C.F.R. § 600.1.
\item \textsuperscript{27} See id § 600.3.
\item \textsuperscript{28} Itt.
\item \textsuperscript{29} See id. § 600.3(b).
\item \textsuperscript{30} See id. § 600.3(a).
\item \textsuperscript{31} See id. § 600.4(a).
\end{itemize}
adjustments in jurisdictional authority from the Attorney General.\textsuperscript{32} The regulations require that Special Counsels conduct their investigations in accordance with established Department of Justice policies, practices, and procedures.\textsuperscript{33} This is intended both to ensure that the investigation is handled, insofar as is possible, in the same way and under the same standards as would be any other criminal investigation, and to ensure that the long-term institutional interests of the Department of Justice are preserved through the application of consistent policies and practices.

At the same time, the Special Counsel is expressly guaranteed freedom from any day-to-day supervision.\textsuperscript{34} He or she is free to structure the investigation as he or she wishes, and to pursue the case by any appropriate means. The regulations provide that should she deem it necessary in extraordinary circumstances, the Attorney General may request an explanation for a Special Counsel’s decisions, and may overrule the Special Counsel.\textsuperscript{35} This provision reflects our conclusion that experience with the Independent Counsel Act teaches that unfettered discretion vested with a prosecutor subject to no oversight or supervision is unwise, and that ultimate accountability for decisions made with respect to the enforcement of federal criminal law must be returned to the constitutional officer responsible for such matter, the Attorney General, who is in turn answerable to the American people for her decisions.

Inappropriate or improper interference with the Special Counsel’s work, should any such occur, would be dealt with, as it should be, through the established processes of political accountability and constitutional checks and balances that exemplify our system of Government. Accountability is enhanced by an explicit commitment in the regulations to report any situations in which an Attorney General overrules a Special Counsel to Congress, insofar as permitted by law.\textsuperscript{36}

Special Counsels and their staffs will be subject to the same standards of conduct as are other Departmental employees.\textsuperscript{37} However, inquiries into allegations of misconduct or unethical behavior by Special Counsel will occur only at the direction of the Attorney General.\textsuperscript{38} Removal of a Special Counsel, should such ever be necessary, requires good cause, and the personal action of the

\textsuperscript{32} See id. § 600.4(b).
\textsuperscript{33} See id. § 600.7(a).
\textsuperscript{34} See 28 C.F.R. § 600.7(b).
\textsuperscript{35} See id.
\textsuperscript{36} See id.; 28 C.F.R. § 600.9(a)(3).
\textsuperscript{37} See 28 C.F.R. § 600.9(a)(3).
\textsuperscript{38} See id.
Addressing another major deficiency of the Independent Counsel Act, future Special Counsel investigations will operate under an established budget, developed by the Special Counsel and approved by the Attorney General. The discipline and fiscal accountability provided by operating under an established budget is a hallmark of good government, and is a principle we concluded should be extended to these investigations.

Finally, the regulations contemplate a confidential final report to the Attorney General, describing for the record the work of the Special Counsel. In addition, insofar as permitted by law and the exigencies of the investigation, Congress will be notified of the appointment and jurisdiction of a Special Counsel, the removal of a Special Counsel, and the conclusion of the work of a Special Counsel. As I have already mentioned, instances in which the Attorney General finds it necessary to overrule a decision by a special counsel will also be reported to Congress, enhancing the Attorney General’s political accountability.

Conclusion

Having outlined the specifics of the regulations, I would like to return once again to the fundamental principle that guided us in drafting these regulations. In an area that we freely concede presents extraordinarily difficult issues that may have no perfect solution, we sought to achieve a responsible, workable balance between the competing goals of independence and accountability. We devoted considerable thought, in consultation with Congress, to establishing the best accommodation of the competing interests at stake, building in appropriate checks and balances to ensure both accountability and sufficient independence to reassure the public that the investigation has been full and fair. Now it is time to give these regulations a chance to work, to enable us to assess how well they fulfill our goals.